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Supreme Court, U.S.
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In the
Supreme Court of the United States

JOHN M. COURTNEY; LARRY E. TROUTMAN;
MALCOLM A. WEBSTER,

Petitioners,

v.

UNITED STATES OF AMERICA; DAVID R. SMITH,
MAJOR GENERAL, VICE COMMANDER OF THE
HQAFRC/CV, UNITED STATES AIR FORCE RESERVE,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of
Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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70 pp

QUESTIONS PRESENTED FOR REVIEW

Whether the failure of the court below to find that petitioners have prudential standing to sue, by being within the required, "zone of interest", presents a conflict among the circuits in the application of prudential standing law in wrongful privatization cases previously established by this court, creating a serious and important departure from this court's established decisions and creating an urgent need for review and/or clarification by this court.

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The decision of the 6th Circuit Court of Appeals (App. 1a-18a) is not reported but may be found at 2002 FED App. 0248 (6th Cir.) File Name: 02a0248p.06.

The decision of the Northern District of Ohio (App. 19a-26a) is not reported, but was rendered in Case Number 4:00 6V 1237 on November 15, 2000.

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court, and the court below, were presented with a federal question involving a claim by the three named plaintiffs, who seek to represent themselves and 93 other federal employees at the Air Force Reserve Station in Youngstown, Ohio, claiming that an Air Force cost comparison study pursuant to Office of Management and Budget's Circular A-76 was conducted unfairly, in violation of procedural guidelines of OMB Circular A-76, the OMB A76 Handbook, the Budget and Accounting Act of 1921 (31 U.S.C. 1 et seq.), the Office of Federal Procurement Policy Act Amendments of 1979 (41 U.S.C. 401 et seq.), and the Federal Activities Inventory Reform Act of 1998 (P.L. 105-270), in illegally failing to award the performance of the workload at issue to the most cost-effective bidder, the government in-house employees, in violation of 10 U.S.C. Section 2304, 2461, 2462, 2463, 2467, 2468, 2469, 2469(a) and the other statutes mentioned herein above. Defendants filed a motion to dismiss claiming lack of standing to sue, which motion was granted on November 19, 2000, after written briefs and memoranda from both sides. A timely notice of appeal was filed and the case was reviewed by the United States Court of Appeals For The Sixth Circuit, oral arguments made on May 2, 2002, and then on July 23, 2002 said Court rendered a decision affirming the district court decision. From that decision, appellants petition this Court with the instant Petition for Writ of Certiorari.

STATEMENT OF THE CASE

This is an action by employees of the United States Air Force Reserve Base, 910 LG/LGC in Vienna, Ohio alleging an illegally and unfairly awarded contracting-out decision to a private contractor, of a workload previously performed by plaintiffs, who were the losing in-house bidders in the contracting-out process, under the Office of Management and Budget's Circular A-76, which seeks to

assure that commercial activities are performed by the entity, whether in-house government employees or private contractors, most efficient and cost-effective in performing said workload.

The Air Force awarded the contract to Griffin Services after a bidding process. Petitioners and their union filed an administrative appeal under the A-76 Circular procedure, which appeal was denied. Plaintiffs, three members of the said union, seeking to represent all 93 employees, filed suit alleging that illegal and unfair cost comparison procedures were followed, resulting in plaintiffs and their co-workers, allegedly the most efficient and cost-effective bidder, to lose both the bidding contest and their federal employment, due to the illegal awarding of the said contract to the less efficient and cost-effective entity, Griffin Services.

Petitioners (plaintiffs) amended their complaint once before responsive pleadings were required, and later filed a motion to amend a second time (shortly after responsive pleadings were due) seeking to add class action allegations. The District Court denied said motion and treated the complaint not as a class action but merely as an action brought by the three named plaintiffs.

Although the facts supporting the merits of the claims of petitioners were never permitted to be fully developed because the case was short-circuited by the granting of a Motion to dismiss at an early stage, and before any discovery, petitioners filed their claim alleging that the Air Force illegally awarded a multimillion dollar base-operating support contract to a private contractor, Griffin Services, by violating those specific statutes and A-76 Office of Management and Budget Circular, which require, and indeed manifest a congressional tent to have, fair competition between the public sector, the federal government employees, and the private sector for the performance of commercial type workloads, and to have

those workloads awarded to the most cost-effective entity. As alleged in the complaint, and further alleged in the Affidavit of Keith Chopic (an exhibit to plaintiffs' trial Court memorandum in opposition to the motion to dismiss), the actions which plaintiffs allege are illegal, which results in the awarding of the workload to the private contractor, have resulted in the less efficient bidder winning the workload, in plaintiffs and their 90 colleagues, with only a handful of exceptions, either losing their federal jobs and careers completely, being forced to relocate to other federal jobs hundreds of miles from their homes, being forced to take early retirement or buy-outs against their will, or being downgraded to lesser positions. The administrative appeal filed by the union was denied, and the timely notice of appeal was filed in the Sixth Circuit, which Court affirmed, leading to the instant Petition.

As set forth in the complaint and in the Affidavit of Keith Chopic, petitioner John M. Courtney, has, as a result of the illegal acts of defendants, been forced to choose between losing his federal career entirely, or accepting a job 300 miles away near the New Jersey/Pennsylvania border at the Tobyhanna Army Facility. Said petitioner chose the latter, and has suffered a traumatic separation from his wife and children, who have employment and school obligations in the area of the affected Air Reserve Base in Vienna Township. Petitioners have alleged, and would allege, if the case were allowed to proceed on its merits, that, as pointed out in the said Chopic Affidavit, one of many unfair features of defendants' actions included a conflict of interest situation in which two or more of the base management employees were in charge of the A-76 Cost Analysis Committee of the federal employees' group, charged with the job of calculating the bid of the in-house employees, have been given top jobs on the base under the contractor, Griffin Services, the "mandatory" first right of refusal to former employees to employment with the contractor was not followed and several of the 93 affected employees were denied jobs because of their attempted participation in this action, and that, as

the contractor assumed the said workload, the higher cost of that contractor's work became clear. Approximately half of the 93 employees whom the three named petitioners have attempted to represent in this suit, including two of the three named Plaintiffs, fearing the lack of on-base placement or any placement, were forced to accept unwanted buy-outs or early retirements, curtailing their careers and diminishing their pension benefits.

Petitioners would demonstrate, if the case proceeded on its merits, that the best interests of taxpayers, and the intent of Congress, have been thwarted by the awarding of the contract to the less efficient entity, and that the required "right of first refusal" offers were not forthcoming as required, in many cases. Petitioners submit that, at a hearing upon the merits, after conducting discovery, they would show that a fair application of the cost comparison statutes and administrative regulations would result in their group being found to be the most efficient and cost-effective entity, requiring a restoration of the contract to said employees group, and resulting in efficiency savings for the government.

SUMMARY OF THE ARGUMENT

Petitioners allege that they and their 90 co-workers suffered true "injuries in fact" (the loss of careers or their diminution), that the injuries were clearly traceable to the challenged action, which is the faulty, unfair and illegal cost comparison methods and actions of defendants. Further, petitioners submit that the injuries to their careers, and the injury to the intent of Congress to assure cost-effective performance, are quite likely to be redressed by a favorable decision of the court upon hearing this case on the merits. Thus, petitioners clearly satisfy all three constitutional requirements for standing to sue, which was not the basis of the ruling below.

Petitioners further argue that the Court below was

in error in holding that plaintiffs are not within the "zone of interests" test enunciated by the Supreme Court of the United States to determine whether such plaintiffs have prudential standing to sue. There is one Sixth Circuit decision which directly impacts this issue: The Sixth Circuit held in *Diebold v. U.S.,* No. 90-5373 (6th Cir.) 1991, 947 F.2d 787, that "the contracting-out decision in this wrongful privatization case is reviewable in a federal district court under the Administrative Procedure Act. We reverse the judgment of the District court in its dismissal for lack of jurisdiction. We remand to the District court for further proceedings including the development of the fact and law governing standing for these plaintiffs." Had the 6th Circuit simply followed it's own precedent in *Diebold,* the facts herein could have been developed in the normal course, in light of the District Court ruling that petitioners had not, at that early stage of the case, demonstrated that they, and more importantly, the taxpayers, had suffered an injury in fact, necessary to show prudential standing.

Petitioners also submit that the numerous prior holdings of the Supreme Court of the United States clearly support plaintiffs' position regarding the "zone of interest" test, and the case relied upon by defendants, and by the trial Court, *National Federation of Federal Employees v. Cheney,* 883 F.2d 1038 (D.C. Cir. 1989) (full citation omitted) is in conflict with the line of United States Supreme Court cases, and with *Diebold* in the 6th Circuit, which have allowed standing in cases similar to the case at bar.

Petitioners also argue that the trial court abused its discretion in denying plaintiffs' motion for leave to file a second amended complaint, seeking to add allegations of class action status. Plaintiffs submit that the granting of said leave to amend, at such an early stage, could not prejudice any party, and that Federal Rules of Civil Procedure 15 and 23 require that the courts grant such amendments freely when justice so requires, and allows motions to certify a class long after commencement of an action.

ARGUMENT

The failure of the Court below to find that petitioners have prudential standing to sue presents a conflict among the Circuits and is in conflict with prior decisions as to standing by this Court creating an important departure from this Court's established decisions as to standing, an important federal issue.

The only decision in the Sixth Circuit on federal employee standing in this context relative to the issue of prudential standing requirements: the "zone of interests" test, is the *Diebold* case, decided in favor of standing. This case should have been followed. The unpublished decision of *National Air Traffic Controllers Association v. Pena,* 1996 U.S. App. LEXIS 8285 (1996), cited by appellees and the Court below, is clearly not applicable since it involves whether a service is inherently a governmental function and can or cannot be properly contracted out under OMB Circular A-76. Petitioners have not argued here that the workload in question is governmental. Therefore, the *National Air Traffic Controllers Association* case is inapplicable here.

The Sixth circuit, and the trial courts within it, are governed by a series of Supreme Court decisions on the issue of whether plaintiffs are within the "zone of interests" standing rule. Appellees' trial Court memorandum erroneously claimed that Courts can only find plaintiffs within the "zone of interests" of the applicable statutes if Congress specifically intended to benefit a given class of plaintiffs by its statute (defendants' trial memorandum at p. 9). This Court has held otherwise.

The most recent, and clearest, Supreme Court pronouncement on the "zone of interests" test is the case of *National Credit Union Admin. v. First National Bank & Trust Co.,* 522 U.S. 479 (1998). The *National Credit Union*

Admin. v. First National Bank & Trust Co. case was an action by commercial banks under Section 10(a) of the Administrative Procedure Act, challenging government agency action by the National Credit Union Administration interpreting the federal credit union statute to allow unrelated groups to become members. In finding that the plaintiffs were arguably within the "zone of interests" contemplated by Congress and thus had standing, the Court spelled out and clarified its consistent line of decisions favoring liberal standing interpretations and allowing liberal access to review of government agency actions:

> "(c) In applying the "zone of interests" test, the Court does not ask whether Congress specifically intended the statute at issue to benefit the plaintiff, see, e.g., *Clarke, supra,* at 399-400, 107 S.Ct., at 747-748. Instead, it discerns the interests "arguably...to be protected" by the statutory provision and inquires whether the plaintiff's interests affected by the agency action in question are among them, see e.g., *Data Processing, supra,* at 153, 90 S.Ct., at 829-830..."

Appellees argued, in their trial Court dismissal motion memo, an earlier case, *Air Courier Conference v. Postal Workers,* 498 U.S. 517 (1991), to support its claim that Congress must be found to have targeted a certain entity in order for that entity to have standing. The Supreme Court in *National Credit Union Admin.* case said that such an interpretation of *Air Courier* is mistaken:

> "We therefore cannot accept petitioners' argument that respondents do not have standing because there is no evidence that the Congress that enacted 109 was concerned with commercial banks' competitive interests. To accept that argument, we would have to

> reformulate the "zone of interests" test to require that congress had specifically intended to benefit a particular (522 U.S. 481) class of plaintiffs before a plaintiff from that class could have standing under the Administrative Procedure Act to sue. Petitioners also mistakenly rely on *Air Courier Conference v. Postal Workers,* 498 U.S. 517, 519, 111 S.Ct. 913, 195, 112, L.Ed.2d 1125. Unlike the plaintiffs there who were denied standing, respondents here have "competitive and direct injury," 498 U.S., at 528, n. 5, 111 S.Ct. at 920, n. 5, as well as an interest "arguably...to be protected" by the statute in question. Under the court's precedents, it is irrelevant that in enacting the FCUA, Congress did not specifically intend to protect commercial banks Pp. 936-938."

Further clarifying, the Supreme Count in *National Credit Union Admin. v. First National Bank & Trust Co.* case tracked the development of the test in their decision in *Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150 (1970), *Arnold Tours, Inc. v. Camp,* 400 U.S. 45 (1970), *Investment Company Institute v. Camp,* 401 U.S. 617 (1971) and *Clarke v. Securities Industry Association,* 479 U.S. 388 (1987):

> "In each case, we declined to accept the Comptroller's argument. In *Data Processing,* we considered it irrelevant that the statutes in question "d(id) not in terms protect a specified group, "because" their general policy (was) apparent(,) and those whose interests (were) directly affected by a broad or narrow interpretation of (the statutes) (were) easily identifiable." 397 U.S., at 157, 90 S.Ct., at 832. In *Arnold Tours,* we similarly believed it

> irrelevant that congress had shown no concern for the competitive position of travel agents in enacting the statutes in question. See 400 U.S., at 46, 91 S.Ct., at 159. In *Investment Company Institute,* we were unmoved by Justice Harlan's comment in dissent that the Glass-Steagall Act was passed *in spite of* its positive effects on the competitive position of investment banks. See 401 U.S., at 640, 91 S.Ct., at 1103-1104 (Harlan, J., dissenting). And in *Clarke,* we did not debate whether (522 U.S. 498) the Congress that enacted the McFadden Act was concerned about the competitive position of securities dealers. See 479 U.S., at 403, 107 S.Ct., at 759. The provisions at issue in each of these cases, moreover, could be said merely to be safety-and-soundness provisions, enacted only to protect national banks and their depositors and without a concern for competitive effects. We nonetheless did not hesitate to find standing." *National Credit Union Admin.* at 938.

Judge Mikva dissenting in the D.C. Circuit's case of *National Federation of Federal Employees v. Cheney,* 883 F.2d 1038 (D.C. Cir. 1989), *cert. denied,* 496 U.S. 936 (1990), provided an excellent discussion of the "zone of interests" test from its inception:

> "Originally, the zone of interests test for 702 claims was adopted, in *Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150, 153-54, 90 S.Ct. 827, 829-30, 25 L.Ed.2d 184 (1970), to enlarge, not restrict, the class entitled to protest administrative action. See *American Friends Service Committee v. Webster,* 720 F.2d 29, 49 (D.C. Cir. 1983). The Supreme Court has repeated loudly and

> clearly that courts are to welcome those pursuing grievances under the Administrative Procedure Act. In *Abbott Laboratories v. Gardner,* 387 U.S. 136, 140-41, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967), the Court said that "the Administrative Procedure Act's generous review provisions must be given a hospitable interpretation" and that "only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review" (internal quotations deleted). In *Barlow v. Collins,* 397 U.S. 159, 166-67, 90 S.Ct. 832, 837-38, 25 L.Ed.2d 192 (1970), the companion case to *Data Processing,* the Court cautioned that "preclusion of judicial review of administrative action adjudicating private rights is not lightly to be inferred" and that "judicial review*** will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." In its most recent opinion on the subject, the Court reiterated that while the "zone of interests" test is a gloss on 702 and provides some limit to access, it "is not meant to be especially demanding," and there need only be "a plausible relationship" between the interest plaintiff asserts and the policies underlying the relevant statutory framework. *Clarke,* 479 U.S. at 396, 399, 403, 107 S.Ct. At 756, 757, 58. In the 19 years since the Court announced the "zone of interests" test for 702 claims, it has yet to find any party before it outside the zone." See *National Federation of Federal Employees v. Cheney* at p. 1054.

The United States Supreme Court, having set forth the standard in *Clarke v. Securities Industry Association* and that line of cases, has clearly and repeatedly granted

standing to plaintiffs whose actual motivation is marginally related to Congress' purposes, but whose asserted interest is consistent with them.

Standing is permitted to those whom Congress intended to be relied on to challenge agency disregard of the law. *Clarke,* 479 U.S. at 399. *Clarke* has held that "there is a presumption of judicial review of agency action which is overcome when there is a fairly discernible congressional intent to preclude it." *id.*

The Sixth Circuit's failure herein below to follow the Supreme Court's standard enunciated in *National Credit Union Admin. v. First National Bank & Trust Co.* and its predecessors, is an unsupportable departure form this Court's pronouncements, and must be reversed. There is also precedent even in the D.C. Circuit (which gave us *National Federation of Federal Employees* and Judge Mikva's strong dissent) for the proposition that standing can be found in cases in which plaintiffs are not affirmatively parties whom Congress was trying to protect. In *Hazardous Waste Treatment Council v. EPA,* 861 F.2d 277 (D.C. Cir. 1988) (per curiam), *cert. denied,* the D.C. Circuit analyzed the Supreme Court's "zone of interests" decisions and concluded that: "In the absence of apparent congressional intent to benefit, however, there may still be standing if some factor – some indicator that the *plaintiff is a peculiarly suitable challenger of administrative neglect* - supports an inference that Congress would have intended eligibility." *id.* 861 F.2d at 283. The decision in *Hazardous Waste Treatment Council* finding that the "zone of interests" issue is to be decided in favor of finding standing under circumstances such as this, where plaintiffs are not only a peculiarly suitable challenger, but the *only* available challenger, shows that even in the D.C. Circuit which rendered the decision in *National Federation of Federal Employees v. Cheney,* there is support for standing in cases such as the instant one.

In the face of this strong line of Supreme Court

precedent favoring standing in such cases, the 1988 Seventh (D.C.) Circuit decision in *National Federation of Federal Employees,* cited as the sole authority by appellees below, and by the trial Court, is singularly unpersuasive. The lengthy discussion by the majority in the *National Federation of Federal Employees,* decision (appellants' trail Court memorandum at p. 9-13), pointing to the thin connection between those plaintiffs' interests and the intent of Congress, is irrelevant as long as there is *"some arguable connection."* Even the same D.C. Circuit Court, later in the same year, (1989) watered down, if not completely rejected, the reasoning in *National Federation of Federal Employees,* the bulwark case of the defendants' trial Court memo on standing, long before the 1998 Supreme Court clarified *Clarke v. Securities Industry Association* with *National Credit Union Admin. v. First National Bank & Trust Co.,* in the case of *American Postal Workers Union v. U.S. Postal Service,* 891 F.2d 304 (D.C. Cir. 1989):

> "In *Clarke,* the most recent instruction from the Supreme Court on the subject, the Court acknowledged that the "zone of interests" test is a gloss on 720 of the Administrative Procedure Act that provides some limits on access to the courts. The *Clarke* Court, however, *in several places admonished this circuit and others in general for a somewhat parsimonious approach to the law of prudential standing,* stating that "there need be no indication of a congressional purpose to benefit the would-be plaintiff." 479 U.S. at 399-400 & n. 15, 107 S.Ct. at 757 & n. 15 (emphasis added). Again, the Court asserted that the test "is not meant to be especially demanding," and that there need be only "a plausible relationship" between the interests propounded by the plaintiff and the policies undergirding the statutory framework. Pp. 396, 399, 403, 107 S.Ct. pp. 755, 757, 759.

> Finally, the Court reaffirmed an established presumption in favor of judicial review. Would-be plaintiffs should be allowed into courts unless they are "not even 'arguably within the zone of interests to be protected or regulated by the statute.'" P. 397, 107 S.Ct. p. 756 (emphasis added, citation omitted). This presumption would seem to operate with particular favor for those plaintiffs that satisfy the constitutional requirements for standing.
>
> As the *Clarke* Court explained, the "zone of interests" test serves as our guide for deciding whether "in view of Congress" evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency action." P. 399, 107 S.Ct. p. 757. In cases such as this, where the would-be plaintiff is not the subject of the contested regulation, the test denies standing only if "the plaintiff's interests are so *marginally related* to or *inconsistent* with the purposes *implicit* in the statute that it cannot reasonably be assumed that congress intended to permit the suit." P. 399, 107 p. 757 (emphasis added).

With the Supreme Court *and* the D.C. Circuit in agreement that there is a *presumption* of standing and reviewability in these cases, "would-be plaintiffs need only have an interest slightly above "marginal," arguable to be precise." That test is easily met in the instant case.

Appellees, in their trial Court memo, relying solely on the D.C. Circuit's 1989 decision in *National Federation of Federal Employees v. Cheney,* try to argue that plaintiffs in *National Federation of Federal Employees* and in the

instant case, are only interested in showing illegal application of contracting-out statutes, *to save their jobs, which*, they argue, is not in the "zone of interests". They cite no real authority for its premise that the employees can not assert an interest in having the government conform to the law in making a contracting-out decision. On the contrary, it is easily arguable that congress plausibly expected someone such as the plaintiffs (federal employees) to enforce its expressed statutory intentions to have a fair contracting-out process. In *Hazardous Waste Treatment Council v. EPA*, 861 F.2d 277 (D.C. Circuit 1988), *cert. denied*, 490 U.S. 1106, at 284 quoting *Clarke v. Securities Industry Association*, the Seventh Circuit interpreted the Supreme Court's "zone of interests" pronouncements to say that, even without clear congressional intent to benefit federal employees with these statutes, the fact that federal employees are *peculiarly suitable challengers of administrative misfeasance*, that would support the argument that Congress would have intended that they have standing. Applying this Court's law of standing consistently, federal employees (and union plaintiffs) do have standing unless the statutes and their histories reveal a congressional intent to preclude reliance on the particular class of plaintiffs.

As Judge Mikva of the D.C. Circuit said in his extensive and well-reasoned dissent in *National Federation of Federal Employees v. Cheney*, (he wrote the majority opinion later that year in *American Postal Workers Union v. U.S. Postal Service* finding standing) at p. 1059:

> "The 1921 Budget Act was enacted to centralize the budget process and make it more economical. This is emphasized repeatedly in its legislative history. For example, its chief sponsor, Rep. James W. Good, said in describing the evil the law was intended to remedy: "We have been talking about economy in Government affairs, and at

> the same time have been practicing extravagance. *** It will be necessary to adopt a system of economy and efficiency in every department, establishment, and bureau in order that the Government of the United States may obtain what it has never obtained before in all its history, and that is a dollar's worth of service, if possible, for every dollar expended." 61 cong.Rec. 980 (1921). Thus, an action brought by *National Federation of Federal Employees* to assure that the Army chooses to obtain needed services by the least expensive means is wholly consistent with congress' purposes."

Petitioners submit that their action here to assure that the Air Force chooses to obtain needed services by the least expensive means is also wholly consistent with Congress' purpose in enacting the contracting-out provisions and the A-76 Circular of OMB. Clearly, they have standing to sue in this case, since they, as the displaced employees, are the only would-be plaintiffs available to seek enforcement of Congress' intent to obtain the most efficient cost for services by fair and lawful cost comparison procedures.

Judge Mikva, in his dissent urging that the majority in *National Federation of Federal Employees v. Cheney,* were contravening their own precedent in *Hazardous Waste Treatment Council v. EPA,* and were contravening *Clarke v. Securities Industries Association* and other Supreme Court decisions, said:

> "There is no evidence that congress intended to benefit federal employees when it passed two of the three statutes at issue, and amiguous evidence as to the third. Thus the question, according to *Hazardous Waste Treatment Council v. EPA,* is whether there

> is some factor - such as that *federal employees are peculiarly suitable challengers of administrative misfeasance* (emphasis added) - that would support an inference that Congress would have intended that they have standing. That factor is present here...".
>
> "...As *Hazardous Waste Treatment Council* indicates, the availability of another potential plaintiff whom Congress affirmatively sought to protect may defeat standing. In the only Supreme Court case - as well as in every post-Clarke D.C. circuit case - rejecting Administrative Procedure Act standing, another potential plaintiff was found to be available...".
>
> "While the existence of an alternative plaintiff, affirmatively contemplated by Congress, may not always be sufficient ground to deny standing, see *International Ladies' Garment Union v. Donovan,* 232 U.S. App. D.C. 309, 722 F.2d 795 (D.C. Cir. 1983), neither the Supreme Court nor this court (since Clarke) has denied Administrative Procedure Act standing when, as here, no alternative plaintiff can be found...".

In the case at bar as well, no alternative plaintiff can be found. As in all such Supreme Court cases, and all such prior Seventh Circuit cases except *National Federation of Federal Employees v. Cheney,* standing should have also been found here by the Court below. The failure of the Sixth Circuit to follow *Diebold* and so find has created a conflict in the Circuits and a decision which departs from this Court's established decisions on prudential standing, and thus must be reviewed and clarified by this Court, to avoid chaos in the process of privatizing procurement in federal government activities.

CONCLUSION

The Sixth Circuit's failure to find prudential standing here is not supported by, and is contrary to, the law of standing in such cases as set forth in a line of Supreme Court decisions starting with *Data Processing Service Organizations, Inc. v. Camp,* through *Clarke v. Securities Industry Association* and finally in *National Credit Union Admin. v. First National Bank & Trust Co.* in 1998, which creates an important departure from this Court's established law and must be addressed and reversed so as to avoid a chaotic conflict and misinterpretation of this Court's pronouncements in this area of standing law, and to avoid a chaotic result in federal procurement.

Respectfully submitted,

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APPENDIX

(Any footnotes trail the end of each document.)

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

ELECTRONIC CITATION: 2002 FED App. 0248P (6th Cir.)
File Name: 02a0248p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN M. COURTNEY, LARRY E. TROUTMAN, and MALCOLM A. WEBSTER, *Plaintiffs-Appellants,*	)	No. 00-4554
v.	)	
DAVID R. SMITH, Major General, Vice Commander of the HQAFRC/CV, *Defendant-Appellee*	)	

Appeal from the United States District Court
for the Northern District of Ohio at Akron.
No. 00-01247 - David D. Dowd, Jr., District Judge.

Argued: May 2, 2002

Decided and Filed: July 23, 2002

Before: MERRITT, SUHRHEINRICH, and GILMAN, Circuit Judges

COUNSEL

ARGUED: Patrick J. Donlin, Warren, Ohio, for Appellants. Thomas M. Bondy, UNITED STATES DEPARTMENT OF JUSTICE, CIVIL DIVISION, APPELLATE SECTION, Washington, D.C., for Appellee. **ON BRIEF:** Patrick J. Donlin, Warren, Ohio, for Appellants. Thomas M. Bondy, Anthony J. Steinmeyer, UNITED STATES DEPARTMENT OF JUSTICE, CIVIL DIVISION, APPELLATE SECTION, Washington, D.C., for Appellee.

GILMAN, J., delivered the opinion of the court, in which SUHRHEINRICH, J., joined. MERRITT, J. (pp. 20-21), delivered a separate dissenting opinion.

OPINION

RONALD LEE GILMAN, Circuit Judge. John M. Courtney, Larry E. Troutman, and Malcolm A. Webster brought suit against Major General David R. Smith, the Vice-Commander of the U.S. Air Force Reserve Command (AFRC), alleging that the federal government violated its internal policies and various laws by outsourcing certain work performed at the Youngstown-Warren Air Force Reserve Base to Griffin Services, Inc., a private contractor. According to the plaintiffs, all of whom worked at the Base prior to the government's decision, the government failed to perform the required cost comparison before granting the contract to Griffin, or made its decision based upon a faulty analysis.

The district court dismissed the complaint for lack of standing, concluding that the plaintiffs failed to demonstrate an injury in fact, one of the three prerequisites for constitutional standing. In addition, the district court determined that the plaintiffs lacked prudential standing because they were not within the "zone of interests"

protected by the statutes under which they brought suit. For the reason set forth below, we **AFFIRM** the judgment of the district court.

I. BACKGROUND

A. Factual background

The Base in question is located in Vienna, Ohio. A cost-comparison analysis of the work performed at the Base began in 1998. This action was initiated by the AFRC pursuant to the procedures set forth in Office of Management and Budget Circular No. A-76 (the Circular). The Circular requires that all commercial activities that are not inherently governmental in nature must be performed by private contractors unless one of several exceptions applies. At issue in the present case is the exception that directs the government to perform work in-house if a cost comparison "demonstrates that the Government is operating or can operate the activity on an ongoing basis at an estimated lower cost than a qualified commercial source." Executive Office of the President, OMB Circular A-76, para. 8(d) (Revised 1999). To comply with the periodic review mandated by the Circular, the AFRC's analysis sought to determine whether a private contractor could perform Base Operating Support Services (BOS) more economically than the federal employees who were doing the work on the Base.

The AFRC announced its decision to grant the BOS contract to Griffin in January of 2000. Within a month of the government's announcement, the union representing the Base's employees filed an appeal of the outsourcing decision with the AFRC. This internal appeal was made possible because of the Circular's requirement that agencies establish an administrative appeals procedure to resolve complaints by "federal employees . . . that have submitted formal bids or offers who would be affected by a tentative decision to convert to or from in-house, contract, or [Inter-Service Support Agreements] as a result of a cost comparison." OMB

Circular A-76, Supp. Part I, Ch. 3, ara. K(2)(b). The AFRC denied the union's appeal in March of 2000.

B. Procedural background

This lawsuit was filed in the United States District Court for the Northern District of Ohio in May of 2000. According to the plaintiffs' amended complaint, the government's decision to award the BOS contract to Griffin rather than to the in-house government employees violated (1) Circular A-76 and its accompanying Supplement, (2) The Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20 (1921) (codified as amended in scattered sections of 31 U.S.C.), (3) the office of Federal Procurement Policy Act Amendments of 1979, 41 U.S.C. §§ 403-36, (4) the Federal Activities Inventory Reform Act of 1998, 31 U.S.C. § 501 Note (Supp. 2002), (5) various federal procurement statutes, 10 U.S.C. §§ 2304, 2461-63, 2467-69, and (6) the Administrative Procedure Act, 5 U.S.C. §§ 702, 706. All three plaintiffs were then working for the Vehicle Maintenance Group at the Base, one of the activities covered by the BOS contract.

The plaintiffs filed a motion for class certification in August of 2000, seeking to represent 93 similarly situated civilian employees at the Base. That same month, the government filed a motion to dismiss for lack of standing. The district court denied class certification in September of 2000 and dismissed the case for lack of standing approximately two months later. With respect to the defendants' motion, the court concluded that the plaintiffs were unable to establish the constitutional requirements for standing because their alleged injuries - the loss of their jobs - had not occurred and were only speculative, and because no guarantee existed that their jobs would have been preserved even if the BOS contract had remained in-house. The district court also determined that because the plaintiffs were not within the "zone of interests" intended to be protected by the statutes under which they had brought suit, they did not satisfy the prudential requirements of

standing. This timely appeal followed.

II. ANALYSIS

A. Standard of review

We review de novo a district court's decision to dismiss a case for lack of standing, *Am. Fed'n of Gov't Employees v. Clinton,* 180 F.3d 727, 729 (6th Cir. 1999). "For purposes of ruling on a motion to dismiss for lack of standing, a complaint must be viewed in the light most favorable to the plaintiff; all material allegations of the complaint must be accepted as true." *Id.* But the plaintiff, as the party invoking federal subject matter jurisdiction, has the burden of persuading the court that all of their requirements necessary to establish standing to bring the lawsuit have been met. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992) (explaining that the party invoking federal jurisdiction has the burden of establishing the three elements that constitute the "irreducible constitutional minimum of standing").

B. Constitutional standing

Article III of the United States Constitution limits the jurisdiction of federal courts to actual "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. To satisfy this "case-or-controversy" requirement, "a plaintiff must establish three elements: (1) an injury in fact that is concrete and particularized; (2) a connection between the injury and the conduct at issue - the injury must be fairly traceable to the defendant's action; and (3) [a] likelihood that the injury would be redressed by a favorable decision of the Court." *Blachy v. Butcher,* 221 F.3d 896, 909 (6th Cir. 2000) (internal quotation marks omitted); *Lujan,* 504 U.S. at 560 (noting that "the core component of standing is an essential and unchanging part of the case-or-controversy requirement").

The district court concluded that the plaintiffs failed to satisfy the injury-in-fact requirement because their alleged injuries - the loss of their jobs - had not actually occurred and were therefore only hypothetical. In reaching its decision, the court noted that federal regulations required Griffin to offer the plaintiffs, as federal employees, "the right of first refusal for employment openings under the contract in positions for which they are qualified . . ." 48 C.F.R. § 52.207-3(a). The district court also expressed its view that "even if the contract had been awarded to the in-house bidders, there is no guarantee that plaintiffs would not have been subject to a RIF [reduction in force] anyway." As a result, the court concluded that the plaintiffs were unable to establish the second and third requirements of Article III standing - causation and redressability.

In response, the plaintiffs argue that the district court failed to give effect to a supporting affidavit establishing that Courtney lost his job at the Base and had to accept a position at Tobyhanna Army repair Depot in Pennsylvania, 350 miles east of the Base, in order to remain a federal employee. The affidavit specifies that Courtney's transfer led to his being separated from his family, all of whom remained in Ohio. Courtney was therefore forced to commute 700 miles round trip every weekend in order to see his family. Although these facts did not appear in the plaintiffs' complaint, the timely filed affidavit supports the proposition that at least one of the plaintiffs has standing to bring this lawsuit. *Warth v. Seldin,* 422 U.S. 490, 501 (1975) (nothing that "it is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of act deemed supportive of plaintiff's standing").

The affidavit does not discuss whether Courtney's new position had a lower salary or reduced benefits, so we are unable to determine whether his move resulted in any economic harm. Courtney's geographic separation from his family, and the associated inconvenience and expense of

having to travel 700 miles each weekend to be with them, might be a sufficient injury to satisfy the first requirement of Article III standing. *See Associated Builders & Contractors v. Perry,* 16 F.3d 688, 691 (6th Cir. 1994) (explaining that "a sufficient 'injury in fact' can be alleged from a noneconomic or aesthetic harm"). But the affidavit does not address whether Troutman or Webster experienced any comparable inconveniences or separations from their families. As a result, even if Courtney's compelled move to Pennsylvania meets the injury-in-fact requirement, neither Troutman nor Webster have provided any evidence to support a conclusion that they have suffered an injury in fact.

Rather than deciding whether Courtney has established Article III standing when it appears unlikely that the other two plaintiffs have done so, we will proceed to an examination of the prudential standing requirements. Our conclusion below that the plaintiffs have failed to satisfy the requirements of prudential standing eliminates the need to rule definitively on the question of constitutional standing. *Fed'l for Am. Immigration Reform, Inc. v. Reno,* 93 F.3d 897, 899 (D.C. Cur. 1996) ("Because we find that the Federation lacks prudential standing, we need not consider the issue of constitutional standing or the political question doctrine.").

C. Prudential standing

Section 10(a) of the Administrative Procedure Act (APA) permits injured parties to obtain judicial review of agency actions that allegedly violate federal statues. 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."). A plaintiff seeking judicial review of agency action under the APA, however, must not only meet the constitutional requirements of standing, but must also demonstrate prudential standing. *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.,* 522 U.S. 479, 488 (1998)

(NCUA) ("We have interpreted § 10(a) of the APA to impose a prudential standing requirement in addition to the requirement, imposed by Article III of the Constitution, that a plaintiff have suffered a sufficient injury in fact."). Prudential standing exists if the interest that the plaintiff seeks to protect is "arguably within the zone of interests to be protected or regulated by the statute . . . in question." *Id.* (ellipsis in original) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v Camp,* 397 U.S. 150, 153 (1970)).

The Supreme Court has acknowledged that the "zone of interest" test "has not proved self-explanatory." *Clarke v. Sec. Indus. Ass'n,* 479 U.S. 388, 396 (1987). Nevertheless, the Court has set forth several general principles to govern the prudential-standing inquiry:

> The "zone of interest" test is a guide for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision. In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. The test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff.

Id. at 399-400 (footnote omitted). Rather than examining whether Congress specifically intended to benefit the plaintiff, the "zone of interest" inquiry consists of "first discern[ing] the interests arguably . . . to be protected by the statutory provision at issue" and "then inquir[ing] whether the plaintiff's interests affected by the agency action

in questions are among them" *NCUA*, 522 U.S. at 492 (ellipsis in original) (internal quotation marks omitted).

The plaintiffs in the present case have a particular interest in retaining their government jobs at the Base. They also assert a more general interest in ensuring that the government conforms to the applicable laws in making outsourcing decisions. But this generalized grievance, which presumably would be shared by all citizens, is insufficient to satisfy the prudential standing requirements. *Coal Operators & Assoc., Inc., v. Babbitt*, 291 F.3d 912, 916 (6th Cir. 2002) (explaining that for the purpose of prudential standing, "a plaintiff's claim must be more than a 'generalized grievance' that is pervasively shared by a large class of citizens") (citing *Valley Forge Christian College v. Americans United for the Separation of Church and State, Inc.*, 454 U.S. 464, 474-75 (1982); *Nat'l Fed'n of Fed. Employees v. Cheney*, 883 F.2d 1038, 1047 (D.C. Cur. 1989) (*Cheney*) ("Appellants may have many 'interests,' but for zone of interest purposes we must look to their particular interests, not to the interests amounting to generalized grievances of all citizens.").

Similarly, the Supreme Court has admonished against allowing plaintiffs to meet the constitutional or prudential requirements of standing by asserting that no other plaintiffs are available to challenge the government actions. *Valley Forge Christian College*, 454 U.S. at 489 ("But '[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.'" (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974) (alternation in original)). We must therefore determine whether the plaintiffs' desire to continue working at the Base falls within the "zone of interest" of any of the statutes cited in their complaint.

1. OMB Circular A-76 and Supplement

The plaintiffs first rely upon the Circular and its

Supplement to demonstrate that their interests are among those that "a relevant statute" seeks to protect. 5 U.S.C. § 702. But neither the Circular nor the Supplement are statutes. *Cheney,* 883 F.2d at 1943 ("The Circular is not a statute, and, although promulgated pursuant to congressional authority, the Circular itself cannot grant standing.") (citation omitted). Instead, they represent and implement the policy of the Executive Branch, which issued the Circular and Supplement pursuant to the authority of the Budget and Accounting Act of 1921, the Office of Federal Procurement Policy Act Amendments of 1979, and the Federal Activities Inventory Reform Act of 1998. Executive Office of the President, OMB Circular A-76, para. 3 (Revised 1999). We therefore conclude that the plaintiffs cannot rely upon the Circular and Supplement to obtain judicial review of whether the AFRC properly awarded the BOS contract to Griffin. *Cheney,* 883 F.2d at 1943 (holding that the plaintiffs, who asserted a claim under the APA to challenge the Army's decision to outsource the work that the plaintiffs had previously performed, could not rely upon the Circular as "a relevant statute" for the purpose of their lawsuit).

Nevertheless, the Circular is relevant insofar as it provides an indication of the congressional purpose behind any of the relevant statutes that plaintiffs contend the AFRC violated. *Clarke,* 479 U.S. at 401 (explaining that "we are not limited to considering the statute under which respondents sued, but may consider any provision that helps us to understand Congress' overall purposes" in the relevant statutes); *Nat'l Air Traffic Controllers Ass'n v. Pena,* No. 95-3016, 1996 WL 102421, at * 3 (6th Cir. March 7,. 1996) (unpublished table decision) ("To the extent that the policies of OMB Circular A-76 are reflected in the [relevant statute] and can inform our understanding of [that statute], its policies may be considered in determining standing.").

But the Circular provides minimal support at best for the plaintiffs' argument that their desire to maintain government employment falls within the zone of interests

protected by the relevant statutes. As noted above, the Circular expresses an unmistakable preference for the federal government to rely upon private contractors to perform commercial activities that the government requires. Executive Office of the President, OMB Circular A-76, para. 4(a) (Revised 1999) ("[I]t has been and continues to be the general policy of the Government to rely on commercial sources to supply the products and services the Government needs."). The Circular also specifies that it does not

> [e]stablish and shall not be construed to create any substantive or procedural basis for anyone to challenge any agency action or inaction on the basis that such action or inaction was not in accordance with this Circular, except as specifically set forth in Part I, Chapter 3, paragraph K of the Supplement, 'Appeals of Cost Comparison Decisions,' and as set forth in Appendix 2, paragraph G, consistent with Section 3 of the Federal Activities Inventory Reform Act of 1998.

Id. at para. 7(c)(8); *see id.* Supp. Part I, Ch. 3, para, K(7) ("The procedure does not authorize an appeal outside the agency or judicial review . . . ."). This limitation suggests that the internal administrative appeals process set forth in the Supplement is intended to be the sole basis for challenging agency action that allegedly violates the Circular.

The dissent focuses on the Circular's definition of "directly affected parties" to support its conclusion that the plaintiffs are "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. We believe that reliance upon this definition is misplaced, however, for two reasons. First, as noted above, the Circular is not a statute. Second, a party cannot be "adversely affected . . . within the meaning of a relevant

statute" unless the party is within the zone of interest sought to be protected by that statute. The Circular's identification of "directly affected parties," in our opinion, relates to nothing more than the internal administrative appeals process detailed in the Supplement. We therefore respectfully disagree with the dissent's conclusion that the plaintiffs' status as "directly affected parties" under the Circular's terms places them within the zone of interest sought to be protected by a relevant statute.

2. The Budget and Accounting Act of 1921

The first statute upon which the plaintiffs rely to meet the prudential standing requirements is the Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20 (1921) (codified as amended in scattered sections of 31 U.S.C.) (the 1921 Act). This legislation, which has been amended thirteen times since its original enactment, was designed "to coordinate budgeting procedures and to increase efficiency in government operations after vast governmental growth during World War I." *Cheney*, 883 F.2d at 1044-45. The 1921 Act sought to achieve these goals by (1) creating the Bureau of the Budget (the predecessor to the OMB) within the Department of the Treasury, and (2) establishing the General Accounting Office (GAO) to serve Congress's interests in auditing federal programs and expenditures. *Id.* at 1045-46 (discussing the key components of the 1921 Act); 31 U.S.C. §§ 501-02, 521-22 (recognizing the OMB as "an office in the Executive Office of the President," designating the key staff positions at the OMB, and granting the OMB's Director the authority to appoint employees and make necessary expenditures); 31 U.S.C. §§ 701-20 (setting forth the GAO's duties and designating its key personnel). These two offices were intended to serve as "checks and balances" over the budgeting process. *Cheney*, 883 F.2d at 1045-46 (noting that "Congress considered these two separate offices, the Bureau and the GAO, one within each political branch, as a functional and valid constitutional 'check and balance' over the expenditure of funds") (citing 59 Cong. Rec. 7949 (1920)

(statement of Rep. James W. Good)).

We agree with the Court of Appeals for the District of Columbia's conclusion that the 1921 Act's legislative history provides no support for the proposition that Congress intended to safeguard the employment of federal employees, or even to provide those workers with a procedure by which they could challenge budgetary decisions which adversely affected them. *Cheney,* 883 F.2d at 1046 ("Nothing in the legislative history of the 1921 Act suggests that Congress contemplated the protection of employment of federal employees."). Instead, the legislative history indicates that Congress was aware that a number of federal employees would lose their jobs as a result of the changes implemented by the 1921 Act. *Id.* at 1046-47 (citing Representative Good's acknowledgment that federal employees would be discharged by the Bureau of the Budget, and noting that "although Congress was well aware that the reformation of the federal budgeting process would result in a loss of federal jobs, it afforded the discharged employees neither protection nor remedy").

We therefore conclude that the plaintiffs' interests in maintaining their employment at the Base are not within the "zone of interests" protected or regulated by the 1921 Act. *Id.* at 1048 ("[T]he legislative history of the Budget and Accounting Act of 1921, as amended, leads us to conclude that Congress did not contemplate in-house federal employees and federal employee labor unions as plaintiffs."). The plaintiffs' particular interests are instead most accurately viewed as being "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress, intended to permit the suit." *Clarke v. Sec. Indus. Ass'n,* 479 U.S. 388, 399 (1987); *Cheney,* 883 F.2d at 1948 ("At most federal employees' interests are marginally related to this centralized annual budgeting process balanced between the Executive and legislative branches [in the 1921 Act]. It is more logical to conclude that federal employees' interests

are inconsistent.") (internal quotation marks and citation omitted). As a result, the 1921 Act cannot serve as "a relevant statute" pursuant to which the plaintiffs can bring their APA challenge to the AFRC's outsourcing decision.

3. The Office of Federal Procurement Policy Act Amendments of 1979

The second statute cited by the plaintiffs in support of their prudential standing argument is the Office of Federal Procurement Policy Act Amendments of 1979, 41 U.S.C. §§ 403-36 9 (OFPPAA). This legislation extended the existence of the Office of Federal Procurement Policy (the OFPP), which Congress had established in 1974, and amended various aspects of the statute. The central purpose of the OFPP is "to provide overall direction of Government-wide procurement policies, regulations, procedures, and forms for executive agencies and to promote economy, efficiency, and effectiveness in the procurement of property and services by the executive branch of the Federal Government." 41 U.S.C. § 403(a).

Nothing in the OFPPAA or in its legislative history supports the conclusion that congress intended to protect the employment of federal workers. Instead, the procurement policy that the OFPP was directed to implement reflects a desire to outsource government work whenever doing so would result in increased cost efficiency. *Cheney,* 883 F.2d at 1949 ("After a thorough review of the OFPPAA and its legislative history, we have found nothing to suggest a congressional purpose more than marginally related to the interests of federal employees vis-a-vis procurement policy. Throughout the legislative history of OFPPAA and its amendments, Congress emphasized economy and efficiency in government operations."). As the D.C. Circuit noted, the Senate Report accompanying the OFPPAA "does not merely favor the private sector; it endorses 'reliance' on the private sector." *Id.* (quoting S. Rep. No. 144, 96th Cong., 1st Sess. 4 (1979), 1979 U.S. Code Cong.

& Admin. News 1492).

Accurate comparisons between the cost of in-house performance and private contracts are essential to achieving the OFPP's goals, but this desired result does not support a finding that Congress had a concern with preserving federal employment when it enacted the OFPPAA. Instead, it demonstrates Congress's interest in ensuring that government funds are spent efficiently. *See id.* (concluding that the Senate Report's "call for 'rigorous comparison of contract cost versus in-house cost,' read in the context of the whole policy, illustrates that Congress wanted in-house costs estimates to be strictly reviewed, so as not to frustrate the . . . emphasis on the private sector") (quoting S. Rep. No. 144, 96th Cong., 1st Sess. 4 (1979), 1979 U.S. Code Cong. & Admin. News 1492). The desire to achieve this goal is shared by all taxpayers, and is not a particular interest of the plaintiffs.

For these reasons, we conclude that the plaintiffs' cognizable interests are not within the "zone of interests" that the OFPPAA protects or regulates. *Cheney,* 883 F.2d at 1050 (concluding that the plaintiffs' interests "are inconsistent with the purposes of the OFPPAA and not within the zone of interest of that Act"). The OFPPAA therefore cannot serve as "a relevant statute" pursuant to which the plaintiffs can bring their APA challenge.

4. The Federal Activities Inventory Reform Act of 1998

Shifting to the Circular's final authorizing statute, the plaintiffs next rely upon the Federal Activities Inventory Reform Act of 1998, 31 U.S.C. § 501 Note (Supp. 2002) (FAIRA), to support their prudential standing argument. This statute requires the head of each executive agency to submit "a list of activities performed by Federal Government sources for the executive agency that, in the judgment of the head of the executive agency, are not inherently

governmental functions" to the Director of the OMB on a yearly basis. 31 U.S.C. §501 Note § 2(a). These lists, which agency heads must provide to Congress and which the Director of the OMB must publish in the Federal Register, identify the activities that the agency heads can consider contracting out to the private sector. *Id.* § 2(c),(d). The FAIRA requires the agency head to utilize "realistic and fair" costs in comparing the expense of procuring services from a private contractor with the costs of federal employees performing the work. *Id.* § 2(e).

Although the FAIRA allows challenges by interested parties, including "[a]n officer or employee of an organization within an executive agency that is an actual or prospective offeror to perform the activity," *id.* § 3(b)(3), these appeals to executive agencies are limited to "a challenge of an omission of a particular activity from, or an inclusion of a particular activity on, a list . . ." *Id.* § 3(a); *Am. Fed'n of Gov't Employees v. United States,* 46 Fed. Cl. 486, 498 (Fed. Cl. 2000) (noting that the FAIRA "specifically distinguishes between the agency's decision to place a particular activity on the list to be contracted out and the agency's decision to contract out to a particular source," that § 3(a) of the statute "is cognizant of this distinction and expressly limits authorized challenges" to the omission or inclusion of an activity on a list, and that the FAIRA's definition of interested parties in § 3(b) "expressly limits challenges to those 'with respect to an activity referred to in subsection [2](a)'") (internal citation omitted) (alternation in original), *aff'd on alternative grounds,* 258 F.3d 1294 (Fed. Cir. 2001). This review process therefor benefits federal employees who contend that their work is inherently governmental and consequently should not be on the lists.

But nothing in the FAIRA provides for review of the cost comparisons that an agency performs. Moreover, the requirement that agencies prepare lists of all activities that rea not inherently governmental accords with the federal government's policy, as expressed in the Circular, to procure

its goods and services from private contractors whenever possible. This policy is also apparent in the FAIRA's legislative history. *Id.* at 497 (acknowledging that the FAIRA's principal sponsor, Senator Craig Thomas, stated "that Congress intended [The FAIRA] to 'codif[y] a process to assure government reliance on the private sector to the maximum extent feasible'") (citing 144 Cong. Rec. S9104-02, S9105 (daily ed. July 28, 1998) (statement of Sen. Thomas)). The FAIRA therefore provides no indication that congress intended to benefit or protect federal employees who are performing work that is concededly not inherently governmental.

For these reasons, we conclude that the plaintiffs' interest in maintaining their federal employment is at best marginally related to, and more likely inconsistent with, the purpose of the FAIRA. *See Am. Fed'n of Gov't Employees v. Cohen,* 171 F.3d 460, 471 (7th Cir. 1999) (*Cohen*) (concluding that "the interests of federal employment and the goal of private procurement are inconsistent"). This statute therefore cannot serve as "a relevant statute" for the purpose of the plaintiffs' APA challenge.

5. Various procurement statutes

Finally, the plaintiffs seek to rely upon several procurement statutes to establish that they have prudential standing. These statues, among other things, (1) require the use of competitive procedures "in conducting a procurement for property or services," 10 U.S.C. § 2304(a), (2) mandate that the Department of Defense (DOD) comply with certain reporting and analysis requirement before transferring commercial or industrial functions that were being performed by DODO civilian employees as of October 1, 1980 to the private sector, 10 U.S.C. § 2461, (3) require the DOD to obtain supplies and services from private sector sources if "realist and fair" costs comparisons reveal that reliance on private contractors would be more economical than the use of federal civilian employees, 10 U.S.C. § 2462, (4) oblige the DOD to collect and retain "cost information data" after

changing the source of DOD services or functions from civilian employees to private contractors or from private contractors to civilian employees, 10 U.S.C. § 2463, (5) mandate that the DOD consider "retirement system costs . . . of both the [DOD] and the contractor" in conducting any cost comparisons required by the Circular, 10 U.S.C. § 2467, and (6) set forth requirement fro contracts to perform "a depot-level maintenance and repair workload." 10 U.S.C. § 2469.

We conclude that none of these statutes support a finding that Congress intended to protect the jobs of federal employees. *Cohen,* 171 F.3d at 470-73 (holding that the plaintiffs were not within the zone of interest protected by either § 2304 or § 2462); *Cheney,* 883 F.2d at 1051 ("Insofar as appellants assert an interest different from the citizenry-at-large, that interest - the protection of government employees whose job opportunities would be impaired because of contracting out - is close to the very bureaucratic interest, in expansion of government, that Congress sought to restrain in all of these statutes.").

The requirements of performing realistic and fair cost comparisons and of considering all relevant factors, as previously noted, suggests that congress intended for the government to operate efficiently and procure its goods and services in the most economical way possible. Moreover, the legislative history of 10 U.S.C. § 2462 indicates that "the provision for a 'realistic and fair' cost comparison was designed to protect the integrity of the contracting out process by resolving 'handicaps' against government contractors - the apparent intended beneficiaries of [the statute]." *Cheney,* 883 F.2d at 1050 (quoting S. Rep. No. 331, 99th Cong., 2nd Sess. 278 (1986), 1986 U.S. Code Cong. & Admin. News 6413, 6472); *Cohen,* 171 F.3d at 470 (noting that the legislative history of § 2462 indicates that the obligation to perform "realistic and fair" cost comparisons "as meant to 'enable private industry to compete with the government sector whenever possible . . .'") (quoting S. Rep.

No. 331, 99th Cong. 2nd Sess. 278 (1986), 1986 U.S. Code Cong. & Admin. News 6413).

Section 2461 requires the DOD to consider "the potential economic effect of performance of the function by the private sector on . . . [e]mployees of the [DOD] who would be affected by such a change in performance." 10 U.S.C. § 2461(b)(3)(B)(i). But we have found no legislative history, nor have the plaintiffs cited any, indicating that this provision was intended to preserve federal employment. On the contrary, § 2461, when read in conjunction with the other procurement statutes and the Circular, recognizes that the DOD will likely transfer work to private contractors in order to increase government efficiency, *See Cohen,* 171 F.3d at 471 (concluding that "the interests of federal employment, and the goal of private procurement are inconsistent").

For these reasons, we conclude that the plaintiffs do to fall within the "zone of interest" of any of the procurement statutes cited in their complaint. These statutes thus cannot serve as the basis for the plaintiffs to bring their APA challenge.

D. Class action

The plaintiffs also appeal the district court's denial of their motion for class certification. Based upon our conclusion that the plaintiffs lack standing to bring their lawsuit, however, they cannot advance the claims of other unnamed individuals. *See Lewis v. Casey,* 518 U.S. 343, 357 (1996) (explaining that "even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent") (internal quotation marks omitted); *Wooden v. Bd of Regents of Univ. Sys. of Georgia,* 247 F.3d 1262, 1287 (11th Cir. 2001) (holding that "as a prerequisite to certification, it must be established that the proposed class representatives have standing to pursue the

claims as to which classwide relief is sought"). We therefore conclude that the district court did not err in denying the plaintiffs' motion for class certification.

III. CONCLUSION

For all of the reasons set forth above we **AFFIRM** the judgment of the district court.

DISSENT

MERRITT, Circuit Judge, dissenting. The Administrative Procedure Act provides that a "person suffering legal wrong because of agency action, or *adversely affected or aggrieved by agency action within the meaning of a relevant statute,* is entitled to judicial review thereof." 5 U.S.C. § 702 (emphasis added). The three plaintiffs, civilian employees of the Defense Department at the Youngstown-Warren Air Force Base, brought this action as aggrieved parties under the Administrative Procedure Act to review a contracting-out decision. The employees are in the "vehicle maintenance group" at the Base and allege that an award of a Defense Department contract to Griffin Services, Inc. will cause them to "lose their federal jobs unless" the award is enjoined. The District Court held that they lack standing because their claim does not satisfy either the :injury-in-fact" test for Article III standing or the APA "zone of interest" test for "Prudential APA standing" as outlined in *NCUA v. First National Bank & Trust,* 522 U.S. 479, 488 (1998). Such contracting-out or privatization decisions are governed by Circular A-76, adopted in 1983 by the Office of Management and Budget for its subsidiary Office of Federal Procurement, pursuant to the Office of Federal Procurement Act Amendments of 1979, 41 U.S.C. § 401. Section 6g of Circular A-76 provides that when contracting-out decisions are made: "*Directly affected parties* are Federal employees and their representative organizations and bidders or offerors on the

instant solicitation" (emphasis in original). The precise question here, a question not expressly addressed in the District Court, is whether this provision of Circular A-76 defining Federal employees as "directly affected parties" under the Procurement Act is sufficient to make federal employees who are about to lose their jobs "adversely affected or aggrieved" parties under the Procurement Act and APA. The contracting-out decision in this case may turn out to be fine on the merits, and the plaintiffs will simply have to suffer the consequences. But to say they are not "adversely affected" by agency action abolishing their jobs defies common sense as well as the position and interpretation of the White House - embodied in Circular 76-A – about who is "directly affected" by such decisions. For this reason, as well as the reasons generally stated in Judge Mikva's dissent in *National Federal of Federal Employees v. Cheney,* 883 F.2d 1038, 1054 (D.C. Cir. 1989), I would grant standing.

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED, NOVEMBER 15, 2000

John M. Courtney, et al.,	)	
	)	
Plaintiffs	)	Case No. 4:00 CV 1247
	)	
vs.	)	**JUDGMENT ENTRY**
	)	
David R. Smith, etc., et al.,	)	
	)	
Defendants	)	
	)	

For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Judgment Entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that defendants' motion to dismiss is granted and the above-captioned action is dismissed. Case closed, with all parties to bear their own costs.

s/ David D. Dowd, Jr.
David D. Dowd, Jr.
U.S. District Judge

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED, NOVEMBER 15, 2000

John M. Courtney, et al.,	)	
	)	
Plaintiffs	)	Case No. 4:00 CV 1247
	)	
vs.	)	**ORDER**
	)	
David R. Smith, etc., et al.,	)	(Resolving Doc. No. 8)
	)	
Defendants	)	
	)	

Before the Court is defendants' motion, pursuant to Fed. R. Civ. P. 12(b)(1), to dismiss the complaint for plaintiffs' lack of standing. (Doc. No. 8). Plaintiffs have filed their response to the motion (doc. No. 12) and defendants have filed a reply. (Doc. No. 13). For the reasons set forth below, the motion is granted.

On May 16, 2000, plaintiffs John M. Courtney, Larry E. Troutman and Malcolm A. Webster filed a complaint for declaratory and injunctive relief against Major General David R. Smith and Brigadier General Michael F. Gjede. The complaint was amended on May 26, 2000, before any responsive pleading had been filed.

The plaintiffs allege that they are individual employees "bringing suit as representative parties on behalf of all 93 civilian employees at the Youngstown-Warren Air force Reserve base, 910 LG/LGC, in Vienna, Ohio" (hereafter "the Base"). (Compl. ¶ 1). Apparently because no separate class allegations had been made, plaintiffs sought leave to amend the complaint a second time to add such allegations. This motion was denied. *See* Order of September 18, 2000

(Doc. No. 11). Accordingly, the complaint is not being treated as a class action but merely as an action brought by the three named plaintiffs.

Plaintiffs allege that this Court has jurisdiction "pursuant to 23 U.S.C. Sections 1331, 1491(b), 2201 and 2202, and *inter alia,* 31 U.S.C. Sections 1 *et seq.*, 41 U.S.C. Sections 401 *et seq.*, Officer of Management and the Budget Circular A-76 and its Supplemental Handbook and 5 U.S.C. Section 702." (Compl. ¶ 2).

Office of Management and Budget ("OMB") Circular A-76 "establishes Federal policy for the performance of recurring commercial activities." It provides federal agencies with "updated guidance and procedures for determining whether recurring commercial activities should be operated under contract with commercial sources, in-house using Government facilities and personnel, or through interservice support agreements."

The plaintiffs, all of whom are federal employees working in the Vehicle Maintenance Group at the Base, are attempting to challenge an Air Force decision to outsource Base Operating Support ("BOS") services. They specifically challenge the initial January 2000 announcement awarding the BOS contract to Griffin Services, Inc. and the subsequent denial of the administrative appeal taken by the Base employees, who apparently were the losing in-house bidders (Comp. ¶¶ 9-13).

The defendants have filed their motion to dismiss challenging plaintiff's standing to sue. The Supreme Court has addressed the constitutional issue of standing as follows:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" - an invasion of a legally protected interest

> which is (a) concrete and particularized, *see* [*Allen v. Wright,* 456 U.S.] at 756, 104 S.Ct., at 3327; *Warth v. Seldin*, 422 U.S. 490, 508, 95 S.Ct. 2197, 2210, 45 L.Ed.2d 343 (1975); *Sierra Club v. Morton,* 405 U.S. 727, 740-741, n. 16, 92 S.Ct. 1361, 1368-1369, n. 16, 31 L.Ed.2d 636 (1972);[1] and (b) "actual or imminent, not 'conjectural' or 'hypothetical'" *Whitmore [v. Arkansas]*, 495 U.S., at 155, 110 S.Ct., at 1723 (quoting *Los Angeles v. Lyons,* 461 U.S. 95, 102, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983)). Second, there must be a causal connection between the injury and the conduct complained of - the injury has to be "fairly . . . Trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Simon v. Eastern Ky. Welfare Rights Organization, 426* U.S. 26, 41-42, 96 S.Ct. 1917, 1926, 48 L.Ed.2d 450 (1976). Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision," *Id.,* at 38, 43, 96 S.Ct., at 1924, 1926.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (footnote in original). Allegations of a future injury will satisfy the concept of "imminence" only if the injury is "*Certainly* impending." *Id.* at 565 n.2 (emphasis in original; citation and internal quotation marks omitted).

Plaintiffs here cannot satisfy these three elements. First, although plaintiffs allege injury in that, "[b]ecause of the illegal actions of the defendants, [they] either have already lost or will by, September 29, 2000, lose their federal jobs and career[]" (Compl. ¶ 1), this is either outrightly wrong or merely speculative since Griffin is required by federal regulation to offer plaintiffs "the right of first refusal for employment openings under the contract in positions for which they are qualified . . ." 48 C.F.R. §§ 52.207-3; 7.305(c).[2]

As for the second and third elements, even if the contract had been awarded to the in-house bidders, there is no guarantee that plaintiffs would not have been subject to a RIF anyway.

In addition to the fundamental Article III requirements, the Supreme Court has recognized other prudential elements of standing, among which is the requirement that "the plaintiff's complaint fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Valley Forge Christian College. v. American United for Separation of Church and State,* 454 U.S. 464, 475 (1982) (quoting *Association of Data Processing Service Orgs. v. Camp,* 397 U.S. 150, 153 (1970)).

> the "zone of interest" test is a guide for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision. In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that congress intended to permit the suit. The test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff. *Investment company Institute v. Camp,* 401 U.S. 617, 91 S.Ct. 1091, 28 L.Ed.2d 367 (1971).

Clarke v. Securities Industry Assoc., 479 U.S. 388, 399-400 (1987) (footnotes omitted).

Federal courts considering claims similar to those

advanced by the plaintiffs have consistently held that federal employees attempting to preserve their government jobs are not within the "zone of interests" intended to be protected buy the budget and procurement statutes under which OMB Circular A-76 was promulgated.

In *National Federation of Federal Employees v. Cheney,* 883 F.2d 1038 (D.C. Cir. 1989), *cert. denied,* 496 U.S. 936 (1990) ("NFFE"), the D.C. Circuit was confronted with a challenge brought by federal employees and their union against a decision by the Army to "contract out" to private contractors the services which had been performed by the Directorate of Logistics at fort Sill, Oklahoma. This Directorate had provided support, maintenance, transportation, and supply functions for Fort Sill and surrounding installations, and had also operated and maintained a fleet of 500 government vehicles. Following the award of these services to a private contractor, the employees and union unsuccessfully pursued administrative remedies. They then filed suit.

Turning first to the Budget and accounting Act of 1921, 31 U.S.C. § 101, *et seq.*, (the "1921 Act"), the D.C. circuit concluded:

> Nothing in the legislative history of the 1921 Act suggests that congress contemplated the protection of employment of federal employees. Indeed, Representative Good's presentation of the 1921 Act to the 67th Congress suggests a congressional purpose inconsistent with those interests. That is, the Act would require that some federal employees be terminated under the new budgeting process.

NFFE, 883 F.2d at 1046.

The court then examined the Office of Federal Procurement Policy Act Amendments of 1979, 41 U.S.C. §

401, *et seq.* ("the OFPPAA") and concluded:

> After a thorough review of the OFPPAA and its legislative history, we have found nothing to suggest a congressional purpose more than marginally related to the interests of federal employees vis-a-vis procurement policy. Throughout the legislative history of OFPPAA and its amendments, congress emphasized economy and efficiency in government operations. Specifically regarding "contracting out," the Senate Committee on Governmental Affairs recognized that there had been a long-standing "executive branch policy of reliance on the private sector" to improve governmental efficiency as expressed in earlier versions of OMB Circular A-76, S. Rep. No. 144, 96th Cong., 1st Sess 4 (1979), U.S. code cong. & Admin. News 1979, p. 1492.
>
> * * *
>
> Since the legislative history of the OFPPAA endorses the Executive branch policy of reliance on the private sector and the [OMB] Circular [A-76] finds authority in the OFPPAA, it is difficult to conclude anything but that the interests of federal employees are inconsistent with the purposes of OFPPAA. As previously discussed, appellants' real interest in this case is the protection of the federal jobs of its members, not efficiency in governmental operations. If appellants' real interest in this case was governmental efficiency, they might very well be within the zone of interest of the purposes of the OFPPAA. But again in the assertion of that interest of efficiency, they have no greater claim to standing than any taxpayers . . . Their real interest of job

> protection flies in the face of a policy that federal departments and agencies, through OMB Circular A-76, should rely on the private sector. Thus appellants' interests are inconsistent with the purposes of the OFPPAA and not within the zone of interest of that Act. *Cf. Clarke,* 479 U.S. at 399, 107 S.Ct. at 757.
>
> Because we hold that appellants' interests are not within the zone of interest of the Budget and Accounting Act of 1921 or the OFPPAA, the statutory authority for OMB Circular A-76, appellants may not assert standing based on those statutes.

Id. at 1049-50. *See also American Federation of Gov't. Employees v. Cohn,* 171 F.3d 460 (7th Cir. 1999) (analyzing the same statutes).

No Sixth Circuit published opinion addresses this question of federal employee standing in the context of "contracting out." However, in an unpublished opinion, the Sixth Circuit seems to endorse the reasoning of the D.C. Circuit in *NFFE. See, National Air Traffic Controllers Assoc., MEBA, AFL-CIO v. Pena,* No. 95-3016, 1996 WL 102421 (6th Cir. March 7, 1996) ("NATCA").

NATCA involved a challenge by federal employees and their union to a decision that air traffic control services are not inherently governmental functions and can, therefore, properly be contracted out under OMB Circular A-76. The Sixth Circuit found that the *NATCA* plaintiffs had standing because their interest "is not just keeping their jobs but extends to ensuring that the FAA does not privatize inherently governmental functions." *NATCA,* 1996 WL 102421, at **4. *NATCA* expressly distinguished *NFFE* stating that "[t]he [*NFFE*] court specifically noted that no assertion had been made in its case that the goods or services involved were inherently governmental . . ." *Id.* at *66. Thus,

NATCA concluded that "the question of standing in relation to inherently governmental functions was not presented in [*NFFE*]." *Id.* Although finding that the plaintiffs in *NATCA* met the "zone of interests" test for standing, the Sixth Circuit remanded the case for a determination on whether the plaintiffs met the Article III requirements of standing.

The plaintiffs in the instant case are doing no more than trying to protect their federal employment. They are not asking for a determination that their vehicle maintenance group performed inherently governmental functions. Therefore, as with the federal employees in *NFFE*, they are not within the "zone of interests" which the statutory formulations are designed to preserve.

Since the plaintiffs here are unable to meet either the Article III requirements of standing or the "zone of interest" test, defendants' are entitled to dismissal of this action.

Accordingly, Doc. No. 8 is granted.]

IT IS SO ORDERED.

s/ David D. Dowd, Jr.
David D. Dowd, Jr.
U.S. District Judge

1 By particularized, we mean that the injury must affect the plaintiff in a personal and individual way.

2 Even if a Base employee is ultimately subject to a reduction in force as a result of the Griffin contract, that employee might be reassigned to another job at the same grade, reassigned to a job with a lower grade but the same pay for two years, *see* 5 C.F.R. § 536.103, accept early retirement, 5 U.S.C. § 8336(d)(2); 8414(b), or accept employment with Griffin. *See generally,* 5 C.F.R. Part 351 (Civil Service RIF procedures).

OMB Circular A-76

OFFICE OF MANAGEMENT AND BUDGET

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20502

CIRCULAR NO. A-76 (REVISED 1999)

August 4, 1983

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Performance of Commercial Activities

1. **Purpose:** This Circular establishes Federal policy regarding the performance of commercial activities and implements the statutory requirements of the Federal Activities Inventory Reform Act of 1998, Public Law 105-270. The Supplement to this Circular sets forth the procedures for determining whether commercial activities should be performed under contract with commercial sources or in-house using Government facilities and personnel.

2. **Rescission.** OMB Circular No. A-76 (Revised), dated March 29, 1979; and Transmittal Memoranda 1 through 14 and 16 through 18.

3. **Authority.** The Budget and Accounting Act of 1921 (31 U.S.C. 1 *et seq.*), The Office of Federal Procurement Policy Act Amendments of 1979. (41 U.S.C. 401 *et seq.*), and The Federal Activities Inventory Reform act of 1998. (P.L. 105-270).

4. **Background.**

a. In the process of governing, the Government should not compete with its citizens. The competitive enterprise system, characterized by individual freedom and initiative, is the primary source of national economic strength. In recognition of this principle, it has been and continues to be the general policy of the Government to rely on commercial sources to supply the products and services the Government needs.

b. This national policy was promulgated through Bureau of the Budget Bulletins issued in 1955, 1957 and 1960. OMB Circular No. A-76 was issued in 1966. The Circular was previously revised in 1967. 1979, and 1983. The Supplement (Revised Supplemental Handbook) was previously revised in March 1996 (Transmittal Memorandum 15).

5. **Policy.** It is the policy of the United States Government to:

a. *Achieve Economy and Enhance Productivity.* Competition enhances quality, economy, and productivity. Whenever commercial sector performance of a Government operated commercial activity is permissible, in accordance with this Circular and its supplement, comparison of the cost of contracting and the cost of in-house performance shall be performed to determine who will do the work. When conducting cost comparisons, agencies must ensure that all costs are considered and that these costs are realistic and fair.

b. *Retain Governmental Functions In-House.* Certain functions are inherently Governmental in nature, being so intimately related to the public interest as to mandate performance only by Federal employees. These functions are not in competition with the commercial sector. Therefore, these functions shall

be performed by Government employees.

c. *Relay on the Commercial Sector.* The Federal Government shall rely on commercially available sources to provide commercial products and services. In accordance with the provisions of this Circular and its Supplement, the Government shall not start or carry on any activity to provide a commercial product or service if the product or service can be procured more economically form a commercial source.

6. **Definitions.** For purpose of this Circular:

a. A *commercial activity* is one which is operated by a Federal Executive agency and which provides a product or service that could be obtained from a commercial source. Activities that meet the definition of an inherently Government function provided below are not commercial activities. A representative list of commercial activities is provided in Attachment A. A commercial activity also may be part of an organization or a type of work that is separable from other functions or activities and is suitable for performance by contract.

b. A *conversion to contract* is the changeover of an activity from Government performance to performance under contract by a commercial source.

c. A *conversion to in-house* is the changeover of an activity from performance under contract to Government performance.

d. A *commercial source* is a business or other non-Federal activity located in the United States, its territories and possessions, the District of Columbia or the Commonwealth of Puerto Rico, which provides a commercial product or service.

e. An *inherently Government function* is a function which is so intimately related to the public interest as to mandate performance by Government employees. Consistent with the definitions provided in the Federal Activities Inventory Reform Act of 1998 and OFPP Policy Letter 92-1, these functions include those activities which require either the exercise of discretion in applying Government authority or the use of value judgment in making decisions for the Government Services or products in support of inherently Governmental functions, such as those listed in Attachment A, are commercial activities and are normally subject to this Circular. Inherently Governmental functions normally fall into two categories:

(1) The *act of governing;* i.e., the discretionary exercise of Government authority. Examples include criminal investigations, prosecutions and other judicial functions; management of Government programs requiring value judgments, as in direction of the national defense; management and direction of the Armed Services; activities performed exclusively by military personnel who are subject to deployment in a combat, combat support or combat service support role; conduct of foreign relations; selection of program priorities; direction of Federal employees; regulation of the use of space, oceans, navigable rivers and other natural resources; direction of intelligence and counter-intelligence operations; and regulation of industry and commerce, including food and drugs.

(2) *Monetary transactions and entitlements,* such as tax collection and revenue disbursements; control of the Treasury accounts and money supply; and the administration of public trusts.

f. A *cost comparison* is the process of developing an

estimate of the cost of Government performance of a commercial activity and comparing it, in accordance with the requirements of the Supplement, to the cost to the Government for contract performance of the activity.

g. *Directly affected parties* are Federal employees and their representative organizations and bidders or offeror on the instant solicitation.

h. *Interested parties* for purposes of challenging the contents of an agency's Commercial Activities Inventory under the Federal Activities Inventory Reform Act of 1998 are:

(1) A private sector source that (A) is an actual or prospective offeror for any contract or other form of agreement to perform the activity; and (B) has a direct economic interest in performing the activity that would be adversely affected by a determination not to procure the performance of the activity from a private sector source.

(2) A representative of any business or professional association that includes within its membership private sector sources referred to in (1) above.

(3) An officer or employee of an organization within an executive agency that is an actual or prospective offeror to perform the activity.

(4) The head of any labor organization referred to in section 7103(a)(4) of Title 5, United States Code that includes within its membership officers or employees of an organization referred to in (3) above.

7. **Scope.**

a. Unless otherwise provided by law, this Circular and its Supplement shall apply to all executive agencies and shall provide administrative direction to heads of agencies.

b. This Circular and its supplement apply to printing and binding only in those agencies or department which are exempted by law from the provision of Title 44 of the U.S. Code.

c. This Circular and its Supplement shall not:

(1) Be applicable when contrary to law, Executive Orders, or any treaty of international agreement;

(2) Apply to inherently Governmental functions as defined in paragraph 6.e.;

(3) Apply to the Department of Defense in times of a declared war or military mobilization;

(4) Provide authority to enter into contracts;

(5) Authorize contracts which establish an employer-employee relationship between the Government and contractor employees. An employer-employee relationship involves close, continual supervision of individual contractor employees by Government employees, as distinguished from general oversight of contractor operations. However, limited and necessary interaction between Government employees and contractor employees, particularly during the transition period of conversion to contract, does not establish an employer-employee relationship.

(6) Be used to justify conversion to contract solely to avoid personnel ceilings or salary

limitations;

(7) Apply to the conduct of research and development. However, severable in-house commercial activities in support of research and development, such as those listed in Attachment A, are normally subject to this Circular and its Supplement; or

(8) Establish and shall not be construed to create any substantive or procedural basis for anyone to challenge any agency action or inaction on the basis that such action or inaction was not in accordance with this Circular, except as specifically set forth in Part 1, Chapter 3, paragraph K if the Supplement, "Appeals of Cost Comparison Decisions" and as set forth in Appendix 2, Paragraph G, consistent with Section 3 of the Federal Activities Inventory Reform Act of 1998.

d. The requirements of the Federal Activities Inventory Reform Act of 1998 apply to the following executive agencies:

(1) an executive department named in 5 USC 101,

(2) a military department named in 5 USC 102, and

(3) an independent establishment as defined in 5 USC 104.

e. The requirements of the Federal Activities Inventory Reform Act of 1998 do not apply to the following entities or activities:

(1) the General Accounting Office,

(2) a Government corporation or a Government controlled corporation as defined in 5 USC 103,

(3) a non-appropriated funds instrumentality if all of its employees are referred to in 5 USC 2105(c), or

(4) Depot-level maintenance and repair of the Department of Defense as defined in 10 USC 2460.

8. **Government Performance of a Commercial Activity.** Government performance of a commercial activity is authorized under any of the following conditions:

a. *No Satisfactory Commercial Source Available.* Either no commercial source is capable of providing the needed product or service, or use of such a source would cause unacceptable delay or disruption of an essential program. Findings shall be supported as follows:

(1) If the finding is that no commercial source is capable of providing the needed product or service, the efforts made to find commercial sources must be documented and made available to the public upon request. These efforts shall include, in addition to consideration of preferential procurement programs (see Part I, Chapter 1, paragraph C of the Supplement) at least three notices describing the requirement in the *Commerce Business Daily* over a 90-day period or, in cases of *bona fide* urgency, two notices over a 30-day period. Specifications and requirements in the solicitation shall not be unduly restrictive and shall not exceed those required of in-house Government personnel or operations.

(2) If the finding is that a commercial source

would cause unacceptable delay or disruption of an agency program, a written explanation, approved by the assistant secretary or designee in paragraph 9.a. of the Circular, must show the specific impact on an agency mission in terms of cost and performance. Urgency along is not adequate reason to continue in-house operation of a commercial activity. Temporary disruption resulting from conversion to contract is not sufficient support for such a finding, nor is the possibility of a strike by contract employees. If the commercial activity has ever been performed by contract, an explanation of how the instant circumstances differ must be documented. These decisions must be made available to the public upon request.

(3) Activities may not be justified for in-house performance solely on the basis that the activity involves or supports a classified program or the activity is required to perform an agency's basic mission.

b. *National Defense.*

(1) The Secretary of Defense shall establish criteria for determining when Government performance of a commercial activity is required for national defense reasons. Such criteria shall be furnished to OMB, upon request.

(2) Only the Secretary of Defense or his designee has the authority to exempt commercial activities for national defense reasons.

c. *Patient Care.* Commercial activities performed at hospitals operated by the Government shall be retained in-house if the agency head, in consultation with the agency's chief medical director, determines that in -house performance would be in the best

interests of direct patient care.

d. *Lower cost.* Government performance of a commercial activity is authorized if a cost comparison prepared in accordance with the Supplement demonstrates that the Government is operating or can operate the activity on an ongoing basis at an estimated lower cost than a qualified commercial source.

9. **Action Requirements.** To ensure that the provisions of this Circular and its Supplement are followed, each agency head shall:

a. Designate an official at the assistant secretary or equivalent level and officials at a comparable level in major component organizations to have responsibility for implementation of this Circular and its Supplement within the agency.

b. Establish one or more offices as central points of contact to carry out implementation. These offices shall have access to all documents and data pertinent to actions taken under the Circular and its Supplement and will respond in a timely manner to all requests concerning inventories, schedules, reviews, results of cost comparisons and cost comparison data.

c. Be guided by Federal Acquisition Regulation (FAR) Subpart 24.2 (Freedom of Information Act) in considering requests for information.

d. Implement this Circular and its Supplement with a minimum of internal instructions. Cost comparisons shall not be delayed pending issuance of such instructions.

e. Ensure the reviews of all existing in-house

commercial activities are completed within a reasonable time in accordance with the Federal Activities Inventory Reform Act of 1998 and the Supplement.

10. **Annual Reporting Requirement.** As required by the Federal Activities Inventory Reform Act of 1998 and Appendix 2 of the Supplement, no later than June 30 of each year, agencies shall submit to OMB a Commercial Activities Inventory and any supplemental information requested by OMB. After review and consultation by OMB, agencies will transmit a copy of the Commercial Activities Inventory to Congress and make the contents of the Inventory available to the public. Agencies will follow the process provide din the Supplement for interested parties to challenge (and appeal) the contents of the inventory.

11. **OMB Responsibility an Contact Point.** All questions or inquiries should be submitted to the Office of Management and Budget, Room 6002 NEOB, Washington, DC 20503. Telephone number (202) 395-6104, FAX (202) 395-7230.

12. **Effective Date.** This Circular and the changes to its Supplement are effective immediately.

EXAMPLES OF COMMERCIAL ACTIVITIES

Audiovisual Products and Services

Photography (still, movie, aerial, etc.)
Photographic processing (developing, printing, enlarging, etc.)
Film and videotape production (script writing, direction, animation, editing, acting, etc.)
Microfilming and other microforms
Art and graphics services
Distribution of audiovisual materials

Reproduction and duplication of audiovisual products
Audiovisual facility management and operation
Maintenance of audiovisual equipment

Automatic Data Processing

ADP services - batch processing, time-sharing, facility management, etc.
Programming and systems analysis, design, development, and simulation
Key punching, data entry, transmission, and teleprocessing services
Systems engineering and installation
Equipment installation, operation, and maintenance

Food Services

Operation of cafeterias, mess halls, kitchens, bakeries, dairies, and commissaries
Vending machines
Ice and water

Health Services

Surgical, medical, dental, and psychiatric care
Hospitalization, outpatient, and nursing care
Physical examinations
Eye and hearing examinations and manufacturing and fitting glasses and hearing aids
Medical and dental laboratories
Dispensaries
Preventive medicine
Dietary services
Veterinary services

Industrial Shops and Services

Machine, carpentry, electrical, plumbing, painting, and other shops

Industrial gas production and recharging
Equipment and instrument fabrication, repair and calibration
Plumbing, heating, electrical, and air conditioning services, including repair
Fire protection and prevention services
Custodial and janitorial services
Refuse collection and processing

Maintenance, Overhaul, Repair, and Testing

Aircraft and aircraft components
Ships, boats, and components
Motor vehicles
Combat vehicles
Railway systems
Electronic equipment and systems
Weapons and weapon systems
Medical and dental equipment
Office furniture and equipment
Industrial plant equipment
Photographic equipment
Space systems

Management Support Services

Advertising and public relations services
Financial and payroll services
Debt collection

Manufacturing, Fabrication, Processing, Testing, and Packaging

Ordnance equipment
Clothing and fabric products
Liquid, gaseous, and chemical products
Lumber products
Communications and electronics equipment
Rubber an plastic products

Optical and related products
Sheet metal and foundry products
Machined products
Construction materials
Test and instrumentation equipment

Office and Administrative Services

Library operations
Stenographic recording and transcribing
Word processing/data entry/typing services
Mail/messenger
Translation
Management information systems, products and distribution
Financial auditing and services
Compliance auditing
Court reporting
Material management
Supply services

Other Services

Laundry and dry cleaning
Mapping and charting
Architect and engineer services
Geological surveys
Cataloging
Training - academic, technical, vocational, and specialized Operation of utility systems (power, gas, water steam, and sewage)
Laboratory testing services

Printing and Reproduction

Facility management an operation
Printing and binding - where the agency or department is exempted from the provisions of Title 44 of the U.S. Code

Reproduction, copying, and duplication
Blueprinting

Real Property

Design, engineering, construction, modification, repair, and maintenance of buildings and structures; building mechanical and electrical equipment and systems; elevators; escalators; moving walks
Construction, alteration, repair, and maintenance of roads and other surface area
Landscaping, drainage, mowing and care of grounds
Dredging of waterways

Security

Guard and protective services
Systems engineering, installation, and maintenance of security systems and individual privacy systems
Forensic laboratories

Special Studies and Analyses

Cost benefit analyses
Statistical analyses
Scientific data studies
Regulatory studies
Defense, education, energy studies
Legal/litigation studies
Management studies

Systems Engineering, Installation, Operation, Maintenance, and Testing

Communications systems - voice, message, data, radio, wire, microwave, and satellite
Missile ranges
Satellite tracking and data acquisition
Radar detection and tracking

Television systems - studio and transmission equipment, distribution systems, receivers, antennas, etc.
Recreational areas
Bulk storage facilities

Transportation

Operation of motor pools
Bus service
Vehicle operation and maintenance
Air, water, and land transportation of people and things
Trucking and hauling